In the Supreme Court of the United States

October Term, 1977
No. 77-794

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

RONALD R. SILVERTON,
Appellant,

v.

STATE OF CALIFORNIA,
Appellee.

77-794

APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

RONALD R. SILVERTON
Pro Se
3600 Wilshire Boulevard
Suite 220
Los Angeles, CA 90010
213/381-7511

Westside Law Publishers Santa Monica, California (213) 451-1714

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I

POSSIBLE MISCONCEPTIONS OF FACT FOSTERED BY APPELLEE'S MOTION TO DISMISS OR AFFIRM

1. Appellee states appellant was convicted of other than a violation of Civil Code § 224p — "advertising without a license." (AM - 2) In fact there was no other conviction that withstood appellate scrutiny (JS, page 18 [bottom] page 19 [top]).[1]

[1] Abbreviations used herein: JS — Appellant's Jurisdictional Statement; RI — Reporter's Transcript of first trial; AO — Appellate Court Opinion; AM — Appellee's Motion to Dismiss or Affirm.

2. Appellee inaccurately sets forth the advertisement constituting the basis of appellant's questionable conviction. (AM-4) What has been set forth by appellee is instead a "Copy of Order Form to Commence" (Index of People's Exhibits so describes Exhibit "6B" — Vol. 2 of RI, page xi). The advertisement in question, as set forth in People's Exhibit "9-D-1" — Vol. 2 of RI, page xiii; and RI 306 and 2712, and set forth verbatim at RI 286, 941 — and by the opinion of the Appellate Court here sought to be reversed (AO at A-5 of JS) is set forth in appellant's Jurisdictional Statement at page 9 thereof, in a quote from the here questioned Appellate Court opinion.

II

CALIFORNIA'S REGULATORY SCHEME INCLUDES INDEPENDENT ADOPTIONS. THE DISSEMINATION OF TRUE INFORMATION ABOUT INDEPENDENT ADOPTION AS AN ALTERNATIVE TO ABORTION, IS PROTECTED BY THE FIRST AMENDMENT.

Appellee contends (AM [bottom] pages 5, 6) that the State of California's regulatory scheme affecting the area of adoption may exclude newspaper solicitation with regard to independent adoptions. However, the California regulatory scheme expressly permits independent adoptions (see JS page 13, footnotes 2 and 3), and would probably be under a constitutional disability to prohibit them. *Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 53 L.Ed.2d 14.[2]

Such a contention must be tested for consistency with the First Amendment (and its application to the states via the Fourteenth Amendment).

Is solicitation by newspaper to give information on independent adoptions, which are permitted by Civil Code § 224q (JS footnote 2), not a form of speech entitled to First Amendment protection, just as obscene or abusive language, threats, or fighting words are not protected? It is

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[2] *Smith v. Organization of Foster Families* at 53 L.Ed.2d page 33:

> "Freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment [citations]. There does exist a private realm of family life which the state cannot enter [citations], that has been afforded both substantive and procedural protection."

well established that "[t]here are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems . . . those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.1031. It follows as a corollary that these utterances can be censored from the media. However, the "speech" here sought to be regulated by criminal sanctions is innocent, according to the State Appellate Court decision here under review, by any standard [3] and "pure" speech is to be accorded comprehensive, perhaps even absolute, protection limited only by the clear and present danger test. *Schenck v. U.S.* (1919) 249 U.S.47, 39 S.Ct.247, 63 L.Ed.47. When it is coupled with "conduct" it requires a balancing of the appellant's First Amendment rights, as in *Pittsburgh Press Co. v. Human Rel. Comm'n.* (1973) 413 U.S. 376; 37 L.Ed.2d 669; 93 S.Ct. 2553, wherein the Court stated:

> "We emphasize that nothing in our holding allows government at any level to forbid (the newspaper) to publish and distribute advertisements . . . nor, a fortiori, does our decision authorize any restriction whatever, whether on content or layout, on stories or commentary originated by (the newspaper), its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial expression of views on these and other issues, however controversial. We hold only . . . that to prohibit placement in sex designated columns of advertisements . . . does not infringe First Amendment rights."

[3] AO page 5 [at top]:

> "Problem Pregnancy. May we help? Free prenatal care. Work suitable to pregnancy. Save-A-Life Adoption Service. 213/631-3109. 24 hours." "It is apparent that, to find any violation of the statute, one must look to the evidence." (As opposed to the expression itself.)

The regulation in the *Pittsburgh Press Co.* case, *supra*, was incidental to and co-extensive with the regulation of employment discrimination. But, in the instant case, there is no statute restricting adoption to agencies only, and if there were, probably it would be unconstitutional as interfering with familial privacy (see *Smith v. Organization of Foster Families, supra,* and the quote therefrom at footnote 2 herein).

The question, to put it simply, is whether any governmental agency can prohibit a person from stating in a newspaper that he will disseminate information on a subject upon which he is permitted to disseminate information. See *Street v. New York* (1969) 394 U.S. 576; 89 S.Ct.1354, 1365; 22 L.Ed.2d 572 (wherein the Court reversed a conviction for public desecration of the American flag).

Nor may free speech be abridged because of the actions of the listeners or readers. *Terminiello v. City of Chicago* (1949) 337 U.S.1, 93 L.Ed. 1131, 69 S.Ct.893.

Other cases show that when speech is coupled with solicitation it is no longer "pure" free speech and is to be tested by the balancing approach. In *Grayned v. City of Rockford* (1972) 408 U.S. 104, 33L.Ed.2d 222, 92 S.Ct. 2294, the Court states:

> "The right to use a public place for expressive activity may be restricted only for weighty reasons." (408 U.S. 115)

In that case, the Court considered reasonable "time, place and manner" regulations (408 U.S. 115, 116, 117).

In the instant case, the advertisement was identical to numerous other advertisements (though the content of the advertisements was the same, the purpose of the other advertisments was to disseminate information on abortion rather than adoption [People's Exhibit "6"]); and the California Court of Appeal, whose decision is here sought to be reviewed, stated in effect that neither the time, place, nor manner of placement was offensive, but rather:

> "It is apparent that, to find any violation of the statute, one must look to the evidence. This shows that defendant held no license or permit from the State Department of Health to run an adoption service and that the business of Save-A-Life (defendant) was obtaining children for adoption (A projected earnings record of this agency showed that it expected to make over $3 million in 24 months)." (AO page 5, 6)

However, if the intent of the statute is to punish defendant for holding no license or permit from the State Department of Health for engaging in the business of obtaining children for adoption, there is no necessity of encroaching on free speech interests. A statute making the obtaining of children for adoption without holding a license or permit from the State Department of Health criminal would be a sanction certain to punish such conduct. Such statutes are extant in California. Appellant was charged with a violation of that statute, but not convicted. (AO pages 2 and 3; page 10, second paragraph.)

The court said in *Broadrick v. Oklanoma* (1973) 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908:

> "It has long been recognized that the First Amendment needs breathing space and that

> statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. [citations] As a corollary, the Court has altered its traditional rules of standing to permit — in the First Amendment area — 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' *Dombrowski v. Pfister,* 380 U.S. at 486, 14 L. Ed.2d 22. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.
>
> "Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.' [citations] In such cases, it has been the judgment of the Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.
>
> "The consequences of our departure from the traditional rule of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and

unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." (413 U.S. 612 at 613.)

The Court in that case, as well as its companion case of *CSC v. Letter Carriers* (1973) 413 U.S. 548, 37 L. Ed.2d 396, 93 S.Ct. 2880 (cited in AM page 15) held that the regulations aptly applied to conduct of the appellant, independent of any expression, and the expressions themselves were endorsements of political candidates and not, as in the instant case, solicitations to give information.

III

APPLYING CALIFORNIA CIVIL CODE SECTION 224p TO PREVENT SOLICITATION BY ADVERTISEMENT IN A NEWSPAPER OF INDEPENDANT ADOPTION AS AN ALTERNATIVE TO AN ABORTION, DEPRIVED APPELLANT OF HIS CONSTITUTIONAL GUARANTY OF FREE SPEECH

The public interest in information in the field of adoption is manifest:

> "More than half of Americans 15 to 19 years old have had sexual intercourse, Dr. Julius Richmond, assistant health, education and welfare secretary for health, has told a House subcommittee.
>
> "Eleven million of the 21 million persons in that age group have had sexual relations, he said.
>
> "One million teen-age girls become pregnant every year and 600,000 become mothers, he said.
>
> "If recent trends continue, more than 10% of

> AFDC (Aid to Families with Dependent Children) families will he headed by a woman 19 or younger, at a cost of more than $300 million dollars in federal welfare aid, he said."[4]
>
> "The adoption situation has changed radically in the past seven or eight years. Adoptions have substantially decreased. In California, agency adoptions have dropped from 8400 to 3200 per year in the period from 1968 to 1973, a decline of 62 percent. Independent, nonagency adoptions have decreased from 4000 to 2200 per year, or 46 percent during the same period. (Thus, independent adoptions now comprise more than 40 percent of total adoptions.) This major change is taking place despite a continuing unsatisfied demand for adoptable children; because of (among other things) increased use of abortion."[5]

And yet, appellee argues against access to the media by persons engaged in an independent adoption or in offering an arguably better alternative to an abortion than now exists, on the theory that it would be "grossly susceptible to the appearance of commodity trading. . . ." (AM 7), and that such access would provide:

> ". . . ineluctable comparison between the commodity exchange methods of property ownership and the transfer of a child." (AM 12)

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[4] Published on Sunday, March 5, 1978, in the *Los Angeles Times*, from the United Press International news source in Washington, D.C.

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[5] "New Trends and Requirements in Adoption Law and Proposals for Legislative Change," (1975) 49 So. Cal. L.Rev. 10, at page 13, Brigette N. Bodenheimer, Professor of Law, University of California, Davis, prepared to provide the California Law Revision Commission with background information for its study of adoption law.

The comparison to commodity trading is a peril not restricted alone to independent adoptions:

> "Adoption agencies are hard hit by the highly competitive adoption situation. In order to satisfy their long-waiting applicants, they may turn to any means compatible with the letter of the law to locate the necessary children. The situation is fraught with danger for children who run the risk of becoming *commodities on the market* or pawns shifted around to satisfy agency waiting lists or to meet the objectives of state reorientation programs." (Emphasis added.) (Numerous citations to various California cases were given) ("New Trends and Requirements in Adoption Law and Proposals for Legislative Change," pages 15-16 - see footnote 5 supra.)

The advertisement in question in the instant case, according to the Appellate Court decision here sought to be reviewed, clearly is not on its face an advertisement that appellant will place, accept, supply, provide, or obtain children for adoption. The ad acquired significance according to the Appellate Court only by reference to other activities of the appellant (AO 5). (See JS page 20 for citations to the record wherein the trial court eschewed any necessity for a culpable state of mind with regard to a conviction for the violation of the here questioned statute.)

"These other activities", as set forth in the appellate court opinion here to be reviewed, were obtaining children for adoption without having a license from the State Department of Health to run an adoption service (AO 5 — top paragraph). However, the conduct of the appellant in "obtaining children for adoption" resulted in no conviction (the appellant was charged with such a crime — see AO 3, 4). Appellant at all times contended that he

operated his service by assisting pregnant women, who did not want to keep their child, find parents who desired to adopt the child, as an alternative to an abortion. Such activity required no license and was legal, moral, and ethical. (RI 23-61.)

To make it attractive for a pregnant woman to give up her unwanted child for adoption instead of getting an abortion, appellant offered these pregnant women the opportunity to have reasonable maintenance, their medical treatment paid for by his service, and a choice of parents for the child. When the child was born, the mother could change her mind and keep the child without any obligation to appellant's service. To be able to make the program pay for itself, appellant charged fees of $10,000 to adopting parents; since each consummated adoption had to cover the cost attendant on at least three other pregnant woman who kept their child. (At the trial appellant sought to introduce evidence that each licensed adoption agency cost the taxpayers of California more than $10,000 — RI page 3456, line 13 to page 3459, line 20; page 3481, line 22 to page 3484, line 4.)

If the mother of the newly born child desired to go forward with the adoption, she went before a judge of the Superior Court (highest trial court) in the County in which she resided, and signed a consent to the adoption. The adopting parents would then take the child and institute adoption proceedings through the courts of the state and county in which they resided. (RI pages 23-61).

Appellee, in its motion, cites three cases as giving sacrosanct status to an agency adoption over and above the independent adoption and suggested that only those authorized by the Department of Social Welfare should operate in the adoption field as an occupational venture (AM 8). However, none of those cases mentioned the

statute here in question, Civil Code § 224p; and to the contrary, each seems to state that the status of the independent adoption is at least equal to that of the agency adoption. These cases are:

1. San Diego County Dept. of Public Welfare v. Superior Court (1972) 7 C.3d 1, 496 P.2d 453 (AM 8).

> ". . . the social worker in the instant case may have been a little over zealous in an attempt to induce the natural mother to refuse to consent to the adoption by the Real Parties in Interest and to relinquish the child to the Department. . . . [4] " (Footnote "4" refers to "Bodenheimer, The Multiplicity of Child Custody Proceedings — Problems of California Law, 23 Stan. L. Rev.703, 717, wherein the author states that "with respect to independent adoptions, adoption agencies. . . are supposed to be guided solely by what is most beneficial to the child entrusted to them (but). . . develop the conviction at times that their decisions and choices concerning a child's future are superior to those of" (the parents who desire the independent adoption).
>
> "We (the California Supreme Court) cannot assume that adoption agencies will necessarily in all cases have such wisdom and competence that they may be set apart from other custodians and given carte blanche in their control of relinquished children until a petition for adoption is before the court." (7 C.3d at 10).

The *San Diego County Dept. of Public Welfare* case (above), on page 14 of the Court's opinion quotes as follows the case of *In Adoption of McDonald, infra.*

> **2. "In Adoption of McDonald (1954) 43 C.2d 447; 274 P.2d 860) (Am 8),** no requirement of agency consent to an adoption of a child

> relinquished to it can be reasonably implied from the adoption statutes."

3. Smith v. Organization of Foster Families, supra,(AM 8) is quoted in footnote 2 above and seems to be in favor of appellant's position, since in the instant case it is clear that procedural protection may be afforded appellant's liberty interest without derogating from the substantive liberty of another.

A study prepared for the California Legislature in 1975 concludes:

> "Periodically the suggestion is made that independent, nonagency placements for adoption be banned altogether as the only sure means of eliminating black market and other illegal dealings in children. This course of action, which has been followed by very few states, is not recommended here. It has not been established that agency placements are generally more beneficial to children than private placements. Moreover, agency monopoly over adoptive placements has distinct drawbacks. Competition with private placements has been found to have salutary effects on the efficiency of agency procedures. There is an advantage in maintaining the two types of adoptions side by side, with each keeping a check on the other.
>
> "Additional legislation to control black and gray market adoptions is not recommended at this time. Violators of the laws presently in force are seldom prosecuted, nor are physicians or lawyers engaged in illegal adoption practices often subjected to disciplinary proceedings by their professions." [6]

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6 "New Trends and Requirements in Adoption Law and Proposals for Legislative Change", at page 108, see footnote 5 herein.

IV

THE JUDGMENT THAT APPELLANT BE INCARCERATED FOR PLACING AN ADVERTISEMENT SOLICITING PREGNANT WOMEN TO OBTAIN INFORMATION ABOUT INDEPENDENT ADOPTION AS AN ALTERNATIVE TO AN ABORTION, SUBSTANTIALLY PENALIZES SOCIETY

Information on matters of social importance, especially those relating to the marriage relation and the exercise of rights arising from that relationship (common sense tells us that the overwhelming majority of those who seek to adopt are married), is given extensive Constitutional protection. *Griswold v. Connecticut* (1965) 381 U.S. 479; 85 S. Ct. 1678, 14 L.Ed.2d 510.

By seeking to give such information, appellant has been convicted and sentenced to six months incarceration (AO 5).

California Penal Code § 19 provides for maximum sentencing of imprisonment in the County Jail for six months for each misdemeanor conviction. To be given the maximum sentence on a misdemeanor conviction would seem to rationally call for the crime upon which the defendant is convicted to be a "true crime" as distinguished from "regulatory crime" or "public welfare offense."

The Court, by instructions to the jury and in its decisions as to what evidence to permit the jury to hear, would not consider state of mind (*mens rea)* (See JS 20-30), despite the case of *Morissette v. United States* (1952) 342 U.S. 246, 72 S. Ct.240, 96 L. Ed.288 (elaborate historical review of the requirement of *mens rea* for the application of criminal sanction). The court in that case stated that:

> "A relation between some mental element and punishment for a harmful act is almost as instinctive as a child's familiar exculpatory 'but I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrents and reformation in place of retaliation and vengeance as the motivation for public prosecution.
>
> ". . . [I]t is as universal and persistent in mature systems of law as a belief in freedom of human will and a consequent ability and duty of a normal individual to choose between good and evil (for there to be) a relation between some mental element and punishment for a harmful act. . . ." (72 S. Ct. at 243)

The consideration of this instant case by the United States Supreme Court is important far beyond the effect on this individual appellant.

> ". . . [T]he statutory law of adoption in California and other states, enacted over 100 years ago, is overgrown with patchwork amendments which made it difficult for anyone, including experienced lawyers, to find their way through the maze of its provisions."[7]
>
> "California's adoption statute in particular also suffers from unclear and inconsistent provisions, the result of innumerable patchwork amendments made at various times during the hundred

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[7] "New Trends and Requirements in Adoption Law and Proposals for Legislative Change", at page 12, see footnote 5 herein.

> years of its existence. A complete overhaul of the California law would seem to be in order."[8]

A reversal of the conviction of appellant in the instant case can serve as a starting point for rewriting the California law.

Respectfully submitted,

RONALD R. SILVERTON

Pro Se

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[8] "New Trends and Requirements on Adoption Law and Proposals for Legislative Change", at page 109, see footnote 5 herein.